No. 15,530

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN CAVANAUGH,
Appellant,

vs.

B. E. McKENZIE,
Appellee.

Appeal from the United States District Court for the District of Nevada.

APPELLANT'S OPENING BRIEF.

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STATEMENT AS TO JURISDICTION.

On January 24, 1957, John Cavanaugh, appellant, filed a complaint in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, against B. E. McKenzie, appellee, alleging that appellant was the owner of certain real property situate in Washoe County, Nevada; that appellee, as commanding officer of Stead Air Force Base, Washoe County, Nevada, had exceeded his lawful authority by obstructing appellant's access to and from his property, depriving appellant of the use of his property without due process of law.

Appellant prayed that a temporary restraining order issue enjoining appellee from obstructing appellant's access to and from his property and upon a final hearing of the cause, the injunction be made permanent. (Rec. p. 5.)

The temporary restraining order issued on January 24, 1957. (Rec. p. 9.) On January 30, 1957, appellee filed a petition for removal of the cause to the United States District Court for the District of Nevada, pursuant to 43 USCA, Section 1442 (a). (Rec. p. 3.)

On January 30, 1957, appellee filed a motion to dissolve the temporary restraining order issued by the State Court. (Rec. p. 12.)

On February 4, 1957, appellant filed an amended complaint in the United States District Court for the District of Nevada against appellee seeking to enjoin appellee from unlawfully depriving appellant of the use of his property. In the amended complaint, appellant alleged that he was the owner of the property in question, that appellee was the commanding officer of Stead Air Force Base, Washoe County, Nevada, that appellee unlawfully and forcibly restrained appellant from access to and from his property; that appellant had no other convenient means of ingress to or egress from his property, that appellee threatened to continue to obstruct appellant's access to his property, permanently and irreparably diminishing the value of appellant's property; that the action on the part of the appellee was and is beyond any authority conferred upon him as commanding officer of Stead Air Force Base, Washoe County, Nevada, in that

no authority whatsoever has been vested in the appellee by statute, or otherwise, to obstruct roads or other rights of way in the vicinity of Stead Air Force Base, Washoe County, Nevada, upon property held by the United States Government, subject to any and all easements in, upon or across said land. (Rec. p. 13.)

On the basis of this amended complaint, the United States District Court for the District of Nevada issued a temporary restraining order enjoining appellee from obstructing appellant's access to and from his property and ordering appellee to show cause why a preliminary injunction should not issue *pendente lite.* On February 8, 1957, a hearing was held pursuant to the order to show cause why a preliminary injunction should not issue *pendente lite.* (Rec. p. 54.) The Court issued the preliminary injunction and on February 8, 1957, the Honorable Jon R. Ross, District Judge, signed the findings of fact, conclusions of law and preliminary injunction which were filed with the clerk of the Court on February 11, 1957. (Rec. p. 18.)

Following this, appellee filed a motion to dismiss the action, "because it is in substance and effect against the United States of America, which has not consented to be sued or waived its immunity from suit." (Rec. p. 17.) Thereafter, on February 26, 1957, the Court heard oral arguments, briefs having been submitted, on appellee's motion to dismiss. (Rec. p. 33.) On March 25, 1957, the Court filed its order granting motion to dismiss action. (Rec. p. 21.)

On April 2, 1957, appellant duly filed his notice of appeal (Rec. p. 70) and undertaking on appeal

(Rec. p. 70) appellant's designation of record on appeal was then duly filed.

On July 31, 1957, the United States District Court filed its order dismissing the action. (Rec. p. 72.)

On August 1, 1957, appellant duly filed his amended notice of appeal from the order dismissing the action, (Rec. p. 73) and his amended designation of record on appeal was also timely filed. The United States District Court for the District of Nevada had jurisdiction of this matter pursuant to 43 USCA, Section 1442(a).

The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal pursuant to 28 USCA, Section 1291 and Rules 73 and 75, *Federal Rules of Civil Procedure,* to review the order of the United States District Court for the District of Nevada dismissing appellant's action.

STATEMENT OF THE CASE.

John Cavanaugh, appellant, on September 8, 1955, purchased certain lands from the estate of one George W. Burke, deceased. Included in the purchase were the following described lands: T. 20 N., R. 19 E., M.D.B.&M., Sec. 5, E½; E½ W½; excepting therefrom the south 200 feet thereof. George W. Burke had purchased these same lands on March 23, 1950 from the United States of America as surplus property. The United States of America, prior to the sale to Burke, owned all of Sec. 5, T. 20 N., R. 19 E., M.D.B.&M. In the sale to George W. Burke, the fol-

lowing lands in Sec. 5, T. 20 N., R. 19 E., M.D.B.&M. were conveyed from the United States of America to Burke, subsequently to appellant, "E½; E½ W½; excepting therefrom the south 200 feet thereof." This constituted a severance of the above lands from the balance of Section 5, the United States of America retaining title to the following lands in Section 5: W½ of W½; the south 200 feet of the entire section.

The only means of ingress to and egress from appellant's property in Section 5 was via a road transversing the south 200 feet of Section 5, which was unobstructed and in use when Burke acquired the property from the United States of America, and also unobstructed and in use when appellant acquired the property from Burke's estate.

On or about August 1, 1956, B. E. McKenzie, appellee, and commanding officer of Stead Air Force Base, Washoe County, Nevada, placed a padlocked gate across the road above mentioned completely depriving appellant of his only means of ingress to and egress from his property in Section 5, T. 20 N., R. 19 E., M.D.B.&M. Appellant then filed suit to enjoin appellee from obstructing appellant's easement to his property in Section 5, T. 20 N., R. 19 E., M.D.B.&M. Appellant then filed suit to enjoin appellee from obstructing appellant's easement to his property on the grounds that appellant had an easement to his property via the old road, that appellee had no authority to terminate the easement, that appellee had in fact unlawfully obstructed the road thereby unlawfully and without any authority so to do terminated appel-

lant's easement, thereby permanently and irreparably diminishing the value of appellant's property above described. (Rec. pp. 13, 14, 15.) The suit was initially filed in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, (Rec. p. 5) and ultimately removed by appellee to the United States District Court for the District of Nevada. (Rec. p. 3.)

In the United States District Court for the District of Nevada, on February 8, 1957, a hearing was held on an order to show cause why a preliminary injunction should not issue. (Rec. p. 54.) On February 8, 1957, the preliminary injunction issued and on February 11, 1957, it was filed with the Clerk of Court. (Rec. pp. 18, 19, 20.)

On February 8, 1957, appellee filed a motion to dismiss the action on the ground that the Court did not have jurisdiction, because the suit was in substance and effect against the United States of America and no consent had been given to sue. (Rec. p. 17.) Appellant opposed the motion, and at the hearing on the motion to dismiss argued that the suit was not against the United States of America, but against the appellee, because, he had without any authority, statutory or otherwise, taken away appellant's only means of ingress to and egress from his above decribed property, that is, he had destroyed an easement owned by appellant. The easement is a property right, and incorporeal hereditament owned by appellant and the action of appellee amounted to a deprivation of appellant's property without the process of law contrary to

the Fifth Amendment of the Constitution of the United States, and, therefore, the suit was not against the United States of America but against appellee. (Rec. pp. 40-52.)

The United States District Court granted the motion to dismiss on the grounds that the suit was in substance and effect against the United States of America and the United States of America had not consented to be sued or waived its immunity from suit. (Rec. p. 72.) From the order dismissing the action, appellant has processed this appeal.

QUESTION INVOLVED.

Did the United States District Court for the District of Nevada err in dismissing appellant's action on the grounds of sovereign immunity, because the suit falls squarely within the constitutional exception to the doctrine of sovereign immunity?

SPECIFICATION OF ERROR.

The United States District Court for the District of Nevada had jurisdiction of the parties and the subject matter of the complaint, and it was, therefore, error to dismiss this complaint, and it was, therefore, error to dismiss this action pursuant to appellee's motion to dismiss because the case falls squarely within the constitutional exception to the doctrine of sovereign immunity.

SUMMARY OF ARGUMENT.

The United States District Court for the District of Nevada erred in dismissing appellant's action on a motion to dismiss for lack of jurisdiction by virtue of sovereign immunity because appellant's suit falls within the specific application of the constitutional exception to the doctrine of sovereign immunity enunciated by the Supreme Court of the United States in *United States v. Lee,* 106 U.S. 196, 27 L.Ed. 171, 1 S.Ct. 240 (1882), which exception was specifically recognized and affirmed by the Supreme Court of the United States in *Larson v. Domestic and Foreign Commerce Corp.* (1949), 337 U.S. 682, 93 L.Ed. 1628.

ARGUMENT.

On a motion to dismiss, it is axiomatic that well pleaded and material allegations of the complaint must be taken to be true and upon a motion to dismiss under the Federal Rules of Civil Procedure, the complaint should be construed in the light most favorable to the plaintiff with all doubts resolved in plaintiff's favor. *Coole v. International Shoe Co.,* 142 F. 2d 318; *Rank v. Krug,* 90 F. Supp. 773.

Appellant in his complaint alleged ownership of a property right, namely the rights of ingress to and egress from his property in Sec. 5 (Rec. pp. 13, 14), an unlawful and forceful deprivation of that property right by appellee (Rec. pp. 13, 14) beyond any authority conferred on appellee by statute or otherwise.

(Rec. p. 15.) Appellant further alleged irreparable injury in that the value of his property would be destroyed if he be deprived of his right of ingress and egress (Rec. p. 15) and further alleged that he had no adequate remedy at law. (Rec. p. 15.) Appellant prayed for a temporary restraining order, an order to show cause why a preliminary injunction should not issue enjoining appellee from interfering with, diminishing, or impairing appellant's access to and from his property, (Rec. p. 16) and for a final injunction at the conclusion of the proceeding. (Rec. p. 16.)

At the hearing on the order to show cause why a preliminary injunction should not issue the appellee admitted he had no authority to terminate an existing easement. (Rec. pp. 65-66 and 69-70.) The preliminary injunction issued (Rec. pp. 18, 19, 20) and subsequently appellee argued his motion to dismiss.

The sole basis for the motion to dismiss was "That the Court is without jurisdiction to entertain this action because it is in substance and effect against the United States of America, which has not consented to be sued or waived its immunity from suit . . ." (Rec. p. 17.) It was not pretended that appellee had any authority to deprive appellant of his easement and consequently of his fee land in Sec. 5. In the argument on the motion to dismiss appellant argued that the easement was a property right, an incorporeal hereditament, owned by him, and appellee's action in terminating this easement was a deprivation of property without due process of law contrary to

the Fifth Amendment of the Constitution of the United States of America. (Rec. p. 52.) Thus, this case falls squarely within the constitutional exception to the doctrine of sovereign immunity.

I respectfully direct the Court's attention in this regard to the case of *United States v. Lee,* 106 U.S. 196, 27 L.Ed. 171, 1 S.Ct. 240. This is the landmark decision on this question, and I submit, is controlling in the case at bar.

In the *Lee* case, the plaintiff filed on action in ejectment in a Virginia court against Kaufman and Strong, military officers in command of Ft. Arlington, a United States military reservation, and Arlington Cemetery, a national cemetery, and several other defendants, to recover possession of a parcel of land of about eleven hundred acres known as the Arlington Estate, and held by the government as part of Fort Arlington and Arlington Cemetery. As soon as the complaint was filed, the case was removed by writ of certiorari into the Circuit Court of the United States. Immediately upon removal of the cause, the following document was filed by the Attorney General of the United States in the Circuit Court of the United States, 106 U.S. 174.

"George W. C. Lee
vs.
Frederick Kaufman,
H. P. Strong and others. } In ejectment,

And now comes the Attorney-General of the United States and suggests to the court and gives it to understand and be informed (appearing only for the purpose of this motion) that the property

in controversy in this suit has been for more than ten years and now is held, occupied and possessed by the United States, through its officers and agents, charged in behalf of the Government of the United States with the control of the property, and who are in the actual possession thereof, as public property of the United States, for public uses, in the exercise of their sovereign and constitutional powers as a military station, and as a national cemetery established for the burial of deceased soldiers and sailors, and known and designated as the 'Arlington Cemetery', and for the uses and purposes set forth in the certificate of sale, a copy of which, as stated and prepared by the plaintiff and which is a true copy thereof, is annexed hereto and filed herewith, under claim of title, as appears by the said certificate of sale, and which was executed, delivered and recorded as therein appears.

Wherefore, without submitting the rights of the Government of the United States to the jurisdiction of the court, but respectfully insisting that the court has no jurisdiction of the subject in controversy, he moves that the declaration in said suit be set aside, and all the proceedings be stayed and dismissed, and for such other order as may be proper in the premises.

Chas. Devens,
Att'y Gen'l U. S."

Plaintiff demurred to this suggestion and on hearing the demurrer was sustained. The case was then tried to a jury, after all other defendants except Strong and Kaufman had been voluntarily dismissed, resulting in a judgment for plaintiff.

The case was then taken to the Supreme Court of the United States on two writs of error, one in the name of the United States, the other, by the Attorney General of the United States on behalf of Kaufman and Strong. Mr. Justice Miller who wrote the opinion in the Supreme Court stated the question we are here interested in to be resolved as follows, 106 U.S. 176:

> "The counsel for plaintiffs in error and in behalf of the United States assert the proposition, that though it has been ascertained by the verdict of the jury, in which no error is found, that the the plaintiff has the title to the land in controversy, and that which is set up in behalf of the United States is no title at all, the court can render no judgment in favor of the plaintiff against the defendants in the action, because the latter hold the property as officers and agents of the United States, and it is appropriated to lawful public uses.
>
> This proposition rests on the principle that the United States cannot be lawfully sued without its consent in any case, and that no action can be maintained against any individual without such consent, where the judgment must depend on the right of the United States to property, held by such persons as officers or agents for the Government."

In holding that sovereign immunity did not preclude the action, Mr. Justice Miller analyzed the theory of sovereign immunity and distinguished our form of government from the British sovereignty where the doctrine originated. I quote Mr. Justice Miller, 106 U.S. 177:

"Under our system the people, who are there called subjects, are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him, for the protection and enforcement of that right."

Mr. Justice Miller continued, 106 U.S. 178:

"The case before us is a suit against Strong and Kaufman as individuals, to recover possession of property. The suggestion was made that it was the property of the United States, and that the court, without inquiring into the truth of this suggestion, should proceed no further; and in this case, as in that, after a judicial inquiry had made it clear that the property belonged to plaintiff and not to the United States, we are still asked to forbid the court below to proceed further and to reverse and set aside what it has done, and thus refuse to perform the duty of deciding suits properly brought before us by citizens of the United States."

The Court then cited *Meigs v. McClung,* 9 Cranch 11, and said, 106 U.S. 178:

". . . The property sued for in that case was land on which the United States had a garrison erected

at a cost of $30,000, and the defendants were the military officers in possession, and the very question now in issue was raised by these officers, who, according to the bill of exceptions, insisted that the action could not be maintained against them, 'Because the land was occupied by the United States troops, and the defendants as officers of the United States, for the benefit of the United States and by their direction.' They further insisted, says the bill of exceptions, that the United States had a right, by the Constitution, to appropriate the property of the individual citizen. The court below overruled these objections and held that the title being in plaintiff he might recover, and that 'If the land was private property, the United States could not have intended to deprive the individual of it without making him compensation therefor.'

Although the judgment of the circuit court was in favor of the plaintiff, and its result was to turn the soldiers and officers out of possession and deliver it to plaintiff, Ch. J. Marshall concludes his opinion in this emphatic language: 'This court is unanimously and clearly of opinion that the circuit court committed no error in instructing the jury that the Indian title was extinguished, to the land in controversy, and that the plaintiff below might sustain his action.'

We are unable to discover any difference whatever, in regard to the objection we are now considering, between this case and the one before us.''

In further support of his position, Mr. Justice Miller quoted from the opinion of Ch. J. Marshall

in the case of *Osborn v. U. S. Bank,* 9 Wheat 738, as follows, 106 U.S. 179:

> ". . . A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to cases where the Government is in the exercise of its best established and most essential powers, as well as to those which may be deemed questionable . . ."

Following an exhaustive analysis of cases involving the same proposition urged by petitioners, the same proposition urged by appellee on his motion to dismiss, Mr. Justice Miller said, 106 U.S. 180:

> "This examination of the cases in this court establishes clearly this result: that the proposition that when an individual is sued in regard to property which he holds as officer or agent of the United States, his possession cannot be disturbed when that fact is brought to the attention of the court, has been overruled and denied in every case where it has been necessary to decide it; . . ."

Mr. Justice Miller then pointed out that the proposition urged by the government was completely at variance with the Constitution of the United States, and could not be sustained. I quote, 106 U.S. 181:

> "The objection is also inconsistent with the principle involved in the last two clauses of article 5 of the Amendments to the Constitution of the United States, whose language is: 'That no person . . . shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation.'

Conceding that the property in controversy in this case is devoted to a proper public use, and that this has been done by those having authority to establish a cemetery and a fort, the verdict of the jury finds that it is and was the private property of the plaintiff, and was taken without any process of law and without any compensation . . .

If this constitutional provision is a sufficient authority for the court to interfere to rescue a prisoner from the hands of those holding him under the asserted authority of the Government, what reason is there that the same courts shall not give remedy to the citizen whose property has been seized without due process of law and devoted to public use without just compensation?

Looking at the question upon principle, and apart from the authority of adjudged cases, we think it still clearer that this branch of the defense cannot be maintained. It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the Government, must be determined. In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the Government, professing to act in its name. There remains to him but the alternative of resistance which may amount to crime. The position assumed here is that, however clear his rights, no remedy can be afforded to him, when it is seen that his opponent is an officer of the United States, claiming to act under its authority; for, as Chief Justice Marshall says, to examine whether this authority is rightfully assumed, is

the exercise of jurisdiction and must lead to the decision of the merits of the question. The objection of the plaintiffs in error necessarily forbids any inquiry into the truth of the assumption, that the parties setting up such authority are lawfully possessed of it; for the argument is that the formal suggestion of the existence of such authority forbids any inquiry into the truth of the suggestion.

But why should not the truth of the suggestion and the lawfulness of the authority be made the subject of judicial investigation?

In the case supposed, the court has before it a plaintiff capable of suing, a defendant who has no personal exemption from suit and a cause of action cognizable in the court; a case within the meaning of that term, as employed in the Constitution and defined by the decisions of this court. It is to be presumed in favor of the jurisdiction of the court, that the plaintiff may be able to prove the right which he asserts in his declaration.

What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff, a right to recover that which has been taken from him by force and violence and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, acting under the orders of the President, having seized this estate, and converted one part of it into a military fort and another into a cemetery.

It is not pretended, as the case now stands, that the President had any lawful authority to do this,

nor that the legislative body could give him any such authority, except upon payment of just compensation. The defense stands here solely upon the absolute immunity from judicial inquiry of everyone who asserts authority from the executive branch of the Government, however clear it may be made that the executive possessed no such power. Not only that no such power is given, but that it is absolutely prohibited, both to the executive and the legislative, to deprive anyone of life, liberty or property without due process of law, or to take private property without just compensation.

These provisions for the security of the rights of the citizen stand in the Constitution in the same connection and upon the same ground, as they regard his liberty and his property. It cannot be denied that both were intended to be enforced by the judiciary as one of the departments of the Government established by that Constitution. . .

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it. . .

Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President, to be unconstitutional that the courts cannot give remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the Government

without any lawful authority, without any process of law and without any compensation, because the President has ordered it and his officers are in possession?

If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well regulated liberty and the protection of personal rights." The Court emphatically concluded, 106 U.S. 183

The Circuit Court was competent to decide the issues in this case between the parties that were before it; in the principles on which these issues were decided no error has been found; and its judgment is affirmed."

I respectfully submit that the *Lee* case is controlling in the case at bar. To follow the ruling of the District Court would preclude any inquiry into any action of an officer or agent of the government regardless of how wrongful the action be merely upon the assertion of sovereign immunity in a motion to dismiss.

The ruling of the *Lee* case was distinctly affirmed in the recent case of *Larson v. Domestic and Foreign Commerce Corporation,* 337 U.S. 682, 93 L.Ed. 1628, though the *Larson* case was distinguished from the *Lee* case on the facts, due to the fact that there was no asserted unconstitutional taking of property in the *Larson* case, as there was in the *Lee* case and as there is in the case at bar. In his opinion, in the *Larson* case, Ch. Justice Vinson specifically recognized and affirmed the constitutional exception to the doctrine of sover-

eign immunity established in the *Lee* case. I quote Ch. Justice Vinson in this regard, 337 U.S. 696:

> "United States v. Lee, 106 U.S. 196, 27 L. Ed. 171, 1 S. Ct. 240 (1882), is said to have established the rule for which the respondent contends. It did not. It represents, rather, a specific application of the constitutional exception to the doctrine of sovereign immunity. The suit there was against federal officers to recover land held by them, within the scope of their authority, as a United States military station and cemetery. The question at issue was the validity of a tax sale under which the United States, at least in the view of the officers, had obtained title to the property. The plaintiff alleged that title to the land was in him. The Court held that if he was right the defendants' possession of the land was illegal and a suit against them was not a suit against the sovereign. Prima facie, this holding would appear to support the contention of the plaintiff. Examination of the Lee case, however, indicates that the basis of the decision was the assumed lack of the defendants' constitutional authority to hold the land against the plaintiff.
>
> The Court said (106 U.S. at 219):
>
> " 'It is not pretended, as the case now stands, that the President had any lawful authority to (take the land), or that the legislative body could give him any such authority except upon payment of just compensation. The defense stands here solely upon the absolute immunity from judicial inquiry of every one who asserts authority from the executive branch of the government, however clear it may be made that the executive possessed no such power. Not only no such power is given,

but it is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty or property without due process of law, or to take private property without just compensation.

"'Shall it be said . . . that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, without process of law, and without compensation, because the President has ordered it and his officers are in possession?' The Court thus assumed that if title had been in the plaintiff the taking of the property by the defendants would be a taking without just compensation and, therefore, an unconstitutional action. On that assumption, and only on that assumption, the defendants' possession of the property was an unconstitutional use of their power and was, therefore, not validly authorized by the sovereign. For that reason, a suit for specific relief, to obtain the property, was not a suit against the sovereign and could be maintained against the defendants as individuals.

"The Lee case therefore, offers no support to the contention that a claim of title to property held by an officer of the sovereign is, of itself, sufficient to demonstrate that the officer holding the property is not validly empowered by the sovereign to do so. Only where there is a claim that the holding constitutes an unconstitutional taking of property without just compensation does the Lee case require that conclusion. . ."

CONCLUSION.

Wherefore, it is respectfully requested that the Order of the United States District Court for the District of Nevada dismissing appellant's action be reversed.

Dated, Reno, Nevada,
September 16, 1957.

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